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Tribute to Justice Antonin Scalia

REMEMBRANCES OF JUSTICE SCALIA AND REFLECTIONS ON HIS JURISPRUDENCE

Rosalie Berger Levinson*

In the summer of 1993, I was offered the unique experience of teaching with Justice Scalia in Cambridge, England. Ed Gaffney, who was then the Dean, had developed a friendship with the Justice during their time together in the Justice Department. The Justice, of course, selected the topic, and he chose Separation of Powers. I knew that the students would be quite intimidated at the thought of responding to questions from Justice Scalia, who already had earned the reputation of being a tough interrogator. So, the plan was for me to go to Cambridge two weeks early to prepare our students for the Justice's arrival.

On the first day of class, Justice Scalia began by asking the students where in the Constitution the doctrine of separation of powers is found. Being a textualist, the Justice's question was not unanticipated, and I had spent numerous hours trying to help students gain confidence in responding to such questions. Several enthusiastically raised their hands. Justice Scalia called upon one who stated that the powers of each of the three branches are separately set forth in the first three Articles of the Constitution. The student was immediately met with the Justice's outstretched arm pointing at his face while he shouted "Wrong!" All my work building the students' self-confidence was destroyed in five seconds.

Things had already not started out terribly well. In preparation for the course, Justice Scalia sent me all the cases that he intended to cover with the students. In addition, I decided to add one law review article, which was critical of Justice Scalia's originalism jurisprudence. It seemed appropriate for the students to read something on the other side. Apparently Justice Scalia did not think so. At our first introduction, he responded as follows: "Mrs. (not Professor) Levinson, why would you include that ridiculous law review article criticizing me?" He apparently felt there could be no just criticism of originalism, and, over the years, he became more and more dismissive of his critics. Notably, in response to questions about the holding in *Bush v. Gore* he harshly told critics "to get over it."

On the other hand, Justice Scalia criticized his fellow Justices for resting their opinions on their personal views. After his death, Ted Cruz

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remarked that Justice Scalia, in contrast, was “steadfast and true to his beliefs.” Cruz is accurate that the Justice remained true to his beliefs; however, these were not his beloved beliefs in originalism, federalism, and judicial restraint—the doctrines he extolled that summer in Cambridge.

First, as to originalism, I think the Framers would have been surprised to learn that corporations have the same First Amendment speech and freedom of religion rights as natural persons. They would have been surprised to hear that commercial speech should be given the same protection as political speech, even though commercial speech was not recognized as entitled to any constitutional protection at all until the year 1976. They would have been surprised to know that a prohibition on selling violent, interactive video games to minors without parental consent interfered with the First Amendment.

As to federalism and judicial restraint, the most classic repudiation of these two favored doctrines was the Court’s decision in *Bush v. Gore* where Justice Scalia joined his conservative brethren, all Republican presidential appointments, in taking the issue of vote counting away from the State of Florida, contrary to comity, and simultaneously depriving the people of the right to elect their president. Further, the Justice did not exercise judicial restraint when he joined in numerous decisions striking down acts of Congress which held state government employers liable for disability discrimination and age discrimination. He also ignored judicial restraint when he found the Voting Rights Act, as well as campaign finance reform laws, to be unconstitutional.

Although Justice Scalia rallied for originalism, judicial restraint, and federalism to rein in the power of the Court, ultimately he abandoned these doctrines when they interfered with his personal moral, political, and religious beliefs. Professor Geoffrey Stone of the University of Chicago persuasively documents this in his review of twenty of the Court’s more important decisions between 2000 and 2013. He found, not too coincidentally, that every one of Justice Scalia’s votes in these cases, which involved a wide range of subjects, “tracked perfectly the conservative political position.”¹ I agree with Ted Cruz that Justice Scalia was “steadfast and true to his beliefs.” The problem is these beliefs sometimes translated into a legal analysis that looked like “pure applesauce” (to quote the Justice himself).

Actually, over the years, I came to appreciate Justice Scalia’s combative, sarcastic, polarizing style. His opinions became more and

¹ Geoffrey R. Stone, *Justice Scalia’s Greatest Failure*, HUFFPOST POLITICS (Mar. 4, 2016), http://www.huffingtonpost.com/geoffrey-r-stone/justice-scalias-greatest_b_9385216.html [<https://perma.cc/P5CA-KWXX>].

more acerbic, which made it less and less likely that he could convince his colleagues to join him. He could have been much more dangerous to progressive values in light of his brilliant analytical skills as well as his wit.

Scalia championed originalism, but he could not persuade anyone but Justice Thomas to follow this doctrine. Other Justices recognized that originalism yielded disparate results. Justice Stevens, for example, who dissented from Scalia's recognition of a right to carry guns, invoked sources from the founding era to support the belief that the Framers did not intend to protect an individual's right to bear arms. Indeed, the Supreme Court followed Justice Stevens' interpretation of the Second Amendment until the year 2009. Prior Courts viewed the text and founding history to create only a right on the part of the militia to carry guns.

Similarly, Justice Scalia relied on originalism to reject the idea that the First Amendment speech provision includes the right to speak anonymously, whereas his co-originalist Justice Thomas argued that since the founding fathers in fact authored the Federalist Papers anonymously there is a history of anonymity being an important aspect of speech in a true free democracy. Further, fellow originalist Justice Thomas dissented to Justice Scalia's opinion striking down a law that prohibited the sale of violent, interactive video games to minors without parental consent. Justice Thomas explained that the Framers believed that parents have the right to determine what materials children should view and that disseminators of these horrific, violent video games should not have access to children without parental consent.

A more blatant example of Justice Scalia's failure to adhere to originalism is his insistence that affirmative action is prohibited by the Fourteenth Amendment, which he interpreted to require the government to follow color-blind policies. In truth, at the time the Amendment was ratified, the federal government passed several laws granting special privileges to African Americans to rectify the negative impact of slavery. Despite these historical discrepancies, Justice Scalia refused to acknowledge that originalism may not truly enable judges to decide cases neutrally.

To end on a more positive note, I will concede that Justice Scalia certainly could be warm, engaging, and witty. After our initial bad start, I escorted Justice Scalia to various functions in Cambridge, and we had several conversations where he revealed his lighter, more charming disposition. By the end of the week Justice Scalia, in fact, invited me to come with him to meet the Justices of the Canadian Supreme Court who were having a judicial conference in Cambridge the same week. By this

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time, Justice Scalia had learned that I spoke French, and he thought it would be fun to have me converse with the French Canadian Justices in their native tongue. We really had a pleasant time together, which helps me understand how Justice Ginsburg could disagree with him ideologically in so many significant ways and yet refer to him as her “best buddy” on the Court. As Justice Scalia put it, one can like the person, while disliking his ideas.

After his experience with us that summer, Justice Scalia was instrumental in helping to persuade his colleagues, Justice Ginsburg, Justice Thomas, and Justice Rehnquist, to participate in our Cambridge program, thereby exposing numerous Valpo Law students to the unique and memorable opportunity of actually sitting in a classroom with a Supreme Court Justice. In addition, Justice Scalia, as well as his colleagues, came to Valpo Law to judge our Moot Court competition and to guest lecture in our classes. In short, Justice Scalia was a friend to Valpo Law – he had an impact on our students and on our reputation.